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IN THE 1967

SUPREME COURT OF THE UNITED STATES

JAMES W. SMITH,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

APPLICATION FOR WRIT OF CERTIORARI

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ERRATUM

The following error appears on Page Three herein: That portion starting with the sixth line from the top should read as follows: "(3) By writ of certiorari, * * * where any * * * right, * * * is specially set up or claimed under the Constitution, * * * of, * * * the United States."

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES W. SMITH,

Petitioner

v.

THE STATE OF TEXAS,

Respondent

APPLICATION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now James W. Smith, Petitioner, and petitions this Honorable Court to issue its writ of certiorari to the Court of Criminal Appeals of Texas at Austin, Texas, to review that said Court's final decision in Cause Number 38934 on the docket of said Court and styled James W. Smith v. The State of Texas, reported in 409 S.W. 2d 409, a copy of which decision is attached hereto as Appendix "A," and to review that said Court's final decision in Cause

Number 38998 on the docket of said Court and styled James W. Smith v. The State of Texas, reported in 409 S.W. 2d 408, a copy of which decision is attached hereto as Appendix "B," and in support of this petition would respectfully show unto this Honorable Court the following:[1]

JURISDICTION

The jurisdiction of this Honorable Court is sought to be invoked on the grounds that Petitioner's right to due process and equal protection of the law has been denied in that he has been twice convicted through the suppression by the prosecution of evidence.

The final decision of the Court of Criminal Appeals of Texas in Cause Number 38934 was rendered by said Court on the 19th day of October, 1966, and the final decision of the Court of Criminal Appeals of Texas in said Cause Number 38998 was rendered by said court on the 12th day of October, 1966; Petitioner's motion for rehearing in both cases was denied on the 14th day of December, 1966. An order granting an extension of time within which to petition for certiorari was entered in this Court on the 24th day of March, 1967, extending said time to and including May 13, 1967.

The statutory provision believed to confer on this Honorable Court jurisdiction to review the judgments in question by writ of certiorari is Title 28, United States Code, Section 1257, which in material part provides:

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1 These cases present identical and closely related questions and are therefore presented in a single petition. U. S. Sup. Ct. Rule 23, Par. 5, 28 U.S.C.A.

Constitution, * * * of, * * * the United States."

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * right, * * * is specially set up or claimed under the

"(3) By writ of certiorari, * * * where any * * *

QUESTION PRESENTED

Does fundamental fairness require disclosure of the State's file in a criminal case where a prior conviction for the same offense has been overturned because the State suppressed material evidence?

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States, in its pertinent parts as follows:

"Section 1. * * * No State * * * shall * * * deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."[2]

The Charter of the Home Rule City of San Antonio, Bexar County, Texas, in pertinent part as follows:

"Sec. 145. City Records Open to Public

Every citizen shall, during office hours, have the right to examine any and all books, vouchers, records and papers belonging to the City and shall have the right to take copies; and it shall be the duty of the proper custodian of such papers and records to pro-

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2 U.S.C.A. Const. Amend. 14 §1.

duce and exhibit any such papers or records demanded to be inspected by any such citizen."[3]

STATEMENT OF THE CASE

On the 1st day of April, 1964, two indictments against Petitioner were returned by the Grand Jury to the 175th Judicial District Court of Bexar County, Texas. Indictment Number S-63529 charged the offense of indecent exposure to one Opal J. Webber, alleged to have occurred on the 8th day of January, 1964. Indictment Number S-63530 charged the offense of indecent exposure to one Linda Henry,[4] alleged to have occurred on the 7th day of January, 1964. For reasons not here pertinent Indictment Number S-63529 was dismissed on the 24th day of June, 1964, and Indictment Number S-63530 was dismissed on the 19th day of August, 1964.[5]

On the 19th day of August, 1964, a true bill was returned into the 175th Judicial District Court under Number S-63999, which said indictment alleged the same criminal transaction as had been alleged in the previously dismissed Indictment Number S-63529.[6] On the 21st day of October, 1964, Petitioner was convicted in Cause Number S-63999[7] in the 175th Judicial District Court of Bexar

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3 Charter of the City of San Antonio, Bexar County, Texas, effective Jan. 1, 1952.

4 See Stipulation No. 6, at page 6, of Exhibit "A" in Volume marked Motion to Produce Records in No. S-63999.

5 See Stipulation No. 8, at page 7, Exhibit "A," to Volume marked Motion to Produce Records in No. S-63999.

6 See Stipulation No. 9, at page 7, Exhibit "A," Volume marked Motion to Produce Records in No. S-63999.

7 See Stipulation No. 10, at pages 7 and 8, Exhibit "A," in Volume marked Motion to Produce Records in No. S-63999.

County, Texas, and assessed a term of nine years confinement in the Texas Department of Corrections.[8] Thereafter, on the 28th day of January, 1965, the trial judge granted Petitioner a new trial on the grounds that material evidence had been suppressed by the State.[9]

On the 9th day of February, 1965, the Grand Jury returned another true bill against the Petitioner into the 175th Judicial District Court under Number 64475, which said indictment alleged the same criminal transaction as had been alleged in the previously dismissed Indictment Number S-63530.[10]

On the 14th day of April, 1965, Petitioner filed his "Petition for Writs of Mandamus" against the district attorney and the chief of police, seeking disclosure of the district attorney's file and disclosure of the police papers and records.[11] This civil mandamus proceeding was thereafter transferred to the 175th Judicial District Court.[12] The mandamus proceeding was heard and denied on May 10, 1965, [13] and notice of appeal was given the same day.[14].

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8 See Footnote 7, supra.

9 See No. S-63999, Volume marked Motion to Produce Records, Exhibit "A" at page 8, Stipulation No. 11; and see Statement of the trial juge in ruling on Motion for New Trial in original trial of No. S-63999, appearing as Exhibit "B," in Volume marked Motion to Produce Records, which was made a part of Stipulation No. 11, supra, as appears at page 17, line 10, through page 18, line 18, of Exhibit "A" in Volume marked Motion to Produce Records.

10 See "Presentment of Indictment" at page 1 of Transcript in No. 64475.

11 See Petition for Writs of Mandamus at beginning of Exhibit "A" in Volume marked Motion to Produce Records in No. S-63999.

12 See No. S-63999, Volume marked Motion to Produce Records, Exhibit "A," at page 5, Stipulation No. 1.

On the next day, May 11, 1965, Petitioner was tried and convicted in Cause Number S-63999 and was sentenced to two years confinement in the Bexar County Jail.[15] Prior to the commencement of the evidence in said cause, however, by written "Motion to Produce Records," Petitioner sought disclosure of the district attorney's file, including the evidence previously suppressed[16] and access to investigative records from the San Antonio Police Department.[17] By

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13 See title page marked "Petition for Writs of Mandamus" immediately preceding page 1 in Exhibit "A" in Volume marked Motion to Produce Records in Cause No. S-63999.

14 See Volume marked Motion to Produce Records, Exhibit "A," page 33, lines 2 and 3.

15 See Transcript in No. S-63999, page 17, Jury Verdict.

16 See "Motion to Produce Records" appearing in Transcript in No. S-63999 at page 8; and see Volume on Motion to Produce Records in No. S-63999, at page 1, line 11, through page 2, line 2, where specific request was made — (at line 18 on page 1 and at lines 6 and 7 on page 2) — for production of "evidence which was suppressed in the first trial"; and see No. S-63999, Volume marked Motion to Produce Records, Exhibit "A" thereof, at page 31, beginning with line 2, through line 25, consisting of the State's cross-examination of defense counsel where it is stated that the Motion to Produce as against the State sought to reach the "investigative" work product of the prosecution and also see the same cross-examination of defense counsel continuing at page 32, lines 4 through 9, where specific request is made for an investigative report of the district attorney's office, and page 33, line 13, where specific request is made for the report of the witness M. R. Nugent, and page 35, line 17, through page 36, line 2, where specific request is made again for the statement of M. R. Nugent, and the witness Richard Gordon Green, and at page 36, lines 9 through 12, where specific request is made for the statements of the witness Carol Ann Henry, Bill Dorset and Eugene Henry, and at page 36, line 19, where specific request is made for production of the statement of the witness Cathy Ashley; and see Appendix "A" to Appendix "A" to Volume marked Motion to Produce Records, beginning at page 1 through page 5, where the court examines the State's files in No. S-63999, and S-63529 and S-63530 (these were the two original indictments charging the same transactions which were dismissed) and makes specific reference to the portions thereof which were suppressed. The last mentioned reference will be seen to be "excerpts of proceedings" had on the hearing for Motion for New Trial after the original conviction in No. S-63999.

17 See Motion to Produce Records, appearing in Transcript in No. S-63999 at page 8, particularly Paragraph IV thereof.

this "Motion to Produce Records" filed in the criminal case, Petitioner sought the same relief which had been denied him the day before in the civil mandamus proceeding and it was therefore stipulated and agreed that all of the pleadings and statement of facts adduced in the civil mandamus proceeding would be received by the court,[18] which said pleadings and statement of facts are attached as Exhibit "A" to the Volume marked Motion to Produce Records in Cause Number S-63999. The filing of the written Motion to Produce Records prior to the trial of Number S-63999 was felt to be necessary because the court had, the day before, denied the civil mandamus proceeding designed to achieve the same result. The question of Petitioner's appeal in the mandamus proceeding became moot when he was forced to trial the next day in Cause Number S-63999 after his Motion for Continuance therein had been denied. The Motion for Continuance, of course, alleged as the grounds for continuance the failure of the court to grant relief in the civil mandamus proceeding and the petitioner's desire to appeal that decision.[19]

The following day, that is, on May 12, 1965, Petitioner was put to trial for the separate alleged criminal transaction in the same court under Cause Number 64475[20] and was convicted in said cause on the 15th day of May, 1965,

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18 See page 8, lines 8 through 14, in Volume marked Motion to Produce Records, in Cause No. S-63999.

19 See Transcript in No. S-63999, at page 5 thereof, for text of "Motion for Continuance." And see Volume marked Motion for Continuance in Cause No. S-63999, including Exhibit "A" thereto, which consists of pleadings and evidence adduced in hearing on mandamus proceeding.

20 See Title page of Volume marked Statement of Facts in Cause No. 64475.

and assessed fifteen years' confinement in the Texas Department of Corrections.[21]

Petitioner made the same effort in Number 64475 as made in Number S-63999, that is, he filed a written Motion to Produce Records wherein he sought disclosure of the district attorney's file including the evidence suppressed during the original trial of Number S-63999, and access to the investigative records of the San Antonio Police Department relating to the criminal transaction alleged to have occurred on January 7, 1964.[22] As in Number S-63999, the Motion was denied by the trial court without comment or explanation.[23]

Petitioner's contention in connection with the trial court's failure to grant his Motion to Produce Records was carried forward into his Second Amended Motion for New Trial in Number S-63999 filed on June 18, 1965.[24] The Motion for New Trial was denied and Notice of Appeal was given to the Court of Criminal Appeals of Texas on June 5, 1965.[25] Similarly, Petitioner's contention in connection with the trial court's failure to grant his Motion to Produce Records was carried forward into his First Amend-

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21 See Jury Verdict appearing at page 27 in Transcript in No. 64475.

22 See page 9 of Transcript in No. 64475 for text of Motion to Produce Records and see Volume marked Motion to Produce Records, page 1A thereof, lines 5 through 18, where it is stipulated that all of the evidence heard on the mandamus proceeding would be considered on the Motion to Produce and was attached to the Motion to Produce as Exhibit "A."

23 See court's notation at bottom of page 11 of Transcript in No. 64475 and see court's remarks in Volume marked Motion to Produce Records, page 1a, lines 19 and 20.

24 See page 25, Transcript in No. S-63999, Paragraph II.

25 See page 28 of Transcript in No. S-63999.

ed Motion for New Trial in Number 64475 filed on the 4th day of June, 1965.[26] The Motion for New Trial in Number 64475 was denied the 18th day of June, 1965, and Notice of Appeal to the Court of Criminal Appeals of Texas was given the same day.[27]

Petitioner's contention in respect to the trial court's failure to grant his Motion to Produce Records in Number 64475 (No. 38934 in the appellate court below) was assigned as error in his brief in the Court of Criminal Appeals of Texas filed October 5, 1966, under Point of Error No. Two thereof.[28] The same contention concerning the records was carried forward into Petitioner's Motion for Rehearing in Number 38998 filed on the 27th day of October, 1966.[29]

Petitioner's contention in respect to the trial court's failure to grant his Motion to Produce Records in Number S-63999 (No. 38998 in the appellate court below) was assigned as error in his brief in the Court of Criminal Appeals of Texas filed on the 5th day of October, 1966, under Point of Error Number Three thereof.[30] The same contention concerning the records was carried forward into Petitioner's Motion for Rehearing in Number 38934 filed on November 3, 1966, Point of Error Number Three thereof.[31]

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26 See page 31 of Transcript in No. 64475, Paragraph I.

27 See court's Order denying Motion for New Trial at page 44 of Transcript in No. 64475.

28 See page 2, Point of Error No. Two, in "Brief for Appellant" in No. 38998 in the Appellate Court below.

29 See Point of Error No. Two, beginning at page 2 of "Motion for Rehearing" in No. 38998 in the Appellate Court below.

30 See pages 2 and 3, Point of Error No. Three in "Brief for Appellant" in No. 38934.

31 See Point of Error No. Three at page 3 of "Motion for Rehearing" in No. 38934.

It therefore appears that the question above stated, which Petitioner believes to be of constitutional dimensions sufficient to justify this Honorable Court in granting certiorari, was asserted by Petitioner, FIRST, in an independent civil mandamus proceeding prior to trial of either case; SECOND, by written motion supported by evidence in each case; THIRD, by written motion for new trial supported by evidence in each case after conviction; FOURTH, by assignment of error in the brief and on motion for rehearing in each case in the appellate court below. All to no avail.

The trial court's judgment denying the Petition for Writs of Mandamus merely states:

> "The Court * * * proceeded to read and consider all of the pleadings filed in this cause, and heard evidence upon the issues in this cause, and upon the conclusion of the same was of the opinion that the Writs of Mandamus sought in this proceeding should be denied. Therefore, the Court announced that it was his jugment that the Writs of Mandamus sought in this suit should, in all things be Denied, and it is so ordered."[32]

The trial court's order in denying Petitioner's Motion to Produce Records in both cases was effected by merely endorsing the word "overruled" on each motion.[33]

The trial court's refusal of Petitioner's Motion for New Trial in each case, each of which said motions contains an allegation of error for failure to grant the Motion to Produce Records, uses almost identical language, merely stating:

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32 See trial court's judgment in mandamus proceeding following pleadings in Exhibit "A" to Volume marked Motion to Produce Records.

33 In No. S-63999 see bottom of page 10 of Transcript; in No. 64475 see bottom of page 14 of Transcript.

"* * * * and the court having heard the said Motion, and the evidence thereon submitted, is of the opinion that the same should be refused.

"It is, therefore, considered, ordered and adjudged by the court that the said (Amended) Motion for a New Trial herein be and the same is refused, and in all things overruled."[34]

The Court of Criminal Appeals of Texas, in passing upon Petitioner's constitutional assertions in Number 38998,[35] poses the following enigma:

"The first question which merits discussion is appellant's motion to produce for pre-trial inspection any document in the possession of the District Attorney or the Police Chief which might be relevant on the issue of guilt or innocence or punishment. This case was tried before the effective date of Article 39.14, V.A.C.C.P.,[36] but even had it been tried since the Act has been in effect, such a request would have been far too broad, because the article by its terms excepts written statements of witnesses, the work product of counsel and their investigators and their notes or reports."[37]

The Court of Criminal Appeals of Texas had no difficulty in passing upon Petitioner's constitutional assertions in Number 38934 — it merely ignored the whole matter.[38]

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34 See "Order Overruling Defendant's Motion for New Trial" at page 28 in Transcript in No. S-63999 and see "Order overruling Defendant's Motion for New Trial" in No. 64475 at page 44 of the Transcript.

35 No. S-63999 in the trial court.

36 This is a reference to Vernon's Ann. C.C.P. 39.14, effective January 1, 1966.

37 See lower Court's opinion in No. 38998, attached hereto as Appendix "A".

38 See lower Court's opinion in No. 38934, attached as Appendix "B".

ARGUMENT

To the extent that the lower appellate court passed upon the questions here presented, that court, in substance, merely stated that one of the cases was tried before Article 39.14 of the new State code became effective, and that even if it had been tried after said article became effective, Petitioner's motion would have been no good because it was too broad under the provisions of said article. If there is any "reason" to be found in this "ruling" of the lower court the writer hereof is frank to say that it has escaped him.

Petitioner respectfully says that his contentions should be measured by the constitutional standards of due process and equal protection which were certainly in effect when his cases were tried rather than by a provision of an amended State code of procedure enacted subsequent to his conviction.

Surely the lower court's consideration of Petitioner's argument falls far short of full measure. Indeed, the lower court ignored the main thrust of Petitioner's argument, that, is that due process will penalize the prosecution and require it to disclose its entire file to a defendant upon proper motion being made therefor, where it is made to appear that on a previous trial for the same offense the same defendant was convicted through the suppression of evidence. Surely this proposition is inherent in the rule contained in **Brady v. Maryland,**[39] where it is stated:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

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39 373 U. S. 83.

The lower court's assertion that Petitioner's motion was too broad is meaningless in a case where it has been conclusively proven that the defendant was theretofore convicted upon suppressed evidence.[40] How else can such a defendant protect himself in the subsequent trial except to ask that the court require the State to disclose its entire file, including the evidence previously suppressed in order that other evidence be not suppressed? Petitioner's argument in this regard is not academic for there is no doubt that upon the original trial of Number S-63999 evidence was suppressed and the new trial granted for that reason. In granting the new trial the trial court stated:

> "Gentlemen, we have had a number of points in this motion for new trial, and it has been pretty clearly indicated to you I have not been impressed with any of the points here involved except this question of suppression. From the evidence, I cannot conclude that the State maliciously or with deliberation suppressed this evidence. I think it was probably more of an oversight or neglect, but whatever reason it was, I don't think it lessens the State's duty to reveal that to the defendant for the purpose of getting it in the record. Therefore, on that point, I am going to grant the new trial, and ask that you gentlemen agree, before you leave here this morning, with me on a new date for the new trial."[41]

If the fact of suppression in the first trial has been admittedly established prior to a second trial, must a defendant endure a second conviction hoping he will be able

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40 Even without conclusive proof of prior suppression the lower court's assertion that Petitioner's motion was too broad has no support in the record. See Footnote 16. And see all of cross-examination of defense counsel by district attorney beginning page 30, line 22, page 39, line 8, of Exhibit "A" to Volume marked motion to Produce Records.

41 See Exhibit "B," Volume marked Motion to Produce Records in No. S-63999.

to discover and prove other evidence suppressed upon his second trial? In view of the universal disposition among prosecutors never to disclose anything in the State's file, proof of suppression is difficult at best. But once proved, the conclusion is compelled that there must have been a reason.[42] And if such reason does exist, is it not consistent with human experience to expect that other evidence will be suppressed upon a second trial? Of what ultimate benefit is it to a defendant for his original conviction gained by suppressed evidence to be overturned only to be convicted again for the same offense by the suppression of other evidence which he might not be able to establish "the second time around"? It is to prohibit this vice that due process should require the State to open its file prior to the second trial. If the defendant is guilty and the State's file so reflects, what harm is done? On the other hand, if the State's file contains evidence in the form of statements, reports or whatever, favorable to the accused and such evidence is not disclosed upon the second trial, our

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42 The reason in these cases appears in the testimony of the Chief Investigator for the District Attorney who at page 527 of the Volume marked Statement of Facts in No. 64475 testified as follows:

"Q. Mr. Nugent, do you or do you not know that the San Antonio Police Department has been trying to get something on Jimmy Smith, trying to put him in the penitentiary?

Mr. Conaway (Prosecutor): Your Honor, I object to that on the ground that it calls for a rank conclusion on the part of this witness.

Mr. Hill (Defense Atty.): If he knows.

The Court: If he knows. Answer yes or no.

A. Yes.

Q. You do know that to be a fact, don't you?

A. Yes, sir. I answered your question "Yes."
Mr. Hill: All right. I have no further questions."

entire concept of justice is destroyed.[43] If Due Process could speak, would she ask this Petitioner: "I know they did it once, but you don't really think they would try something like that again do you?"?

PRAYER

Petitioner respectfully says that the question here presented is important to the just administration of the criminal law and Petitioner therefore prays this Honorable Court to grant its Writ of Certiorari to the Court of Criminal Appeals of Texas to review said Court's final decision in Cause Nos. 38998 and 38934 on the docket of said Court.

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AFFIDAVIT OF SERVICE

I, Frank Y. Hill, Jr., one of the attorneys for the Petitioners herein, and not a member of the Bar of this Honorable Court, hereby certify that, on the 12th day of May, 1967, I served copies of the foregoing application for Writ of Certiorari on Respondent, the State of Texas, by deposit-

43 Such a rule would not affect the new rule 39.14 alluded to by the court below, the distinction being the fact of suppressed evidence in a prior trial.

ing the same in a United States Post Office with first class Postage Prepaid, addressed to said Respondent's counsel of record as follows:

The Honorable Crawford Martin
Attorney General of Texas
Capitol Station
Austin, Texas

The Honorable Leon Douglas
State's Attorney
Supreme Courts Building
Austin, Texas

The Honorable James Barlow
Criminal District Attorney
County Courthouse
San Antonio, Texas

FRANK Y. HILL, JR.

Before me, the undersigned authority, on this day personally appeared Frank Y. Hill, Jr., known to me to be the person who affixed his name to the above and foregoing instrument and who, after being duly sworn, upon his oath deposed and said that the matters stated therein are true and correct and that he executed the same for the purposes therein stated.

IN EVIDENCE WHEREOF, witness my hand and seal of office this the 12th day of May, 1967.

Notary Public in and for Bexar County, Texas

APPENDIX "A"

COURT OF CRIMINAL APPEALS OF TEXAS

No. 38,934

JAMES W. SMITH,

Appellant

v.

THE STATE OF TEXAS,

Appellee

APPEAL FROM BEXAR COUNTY

OPINION

The offense is indecent exposure to a person under 16 years of age; the punishment, 15 years in the penitentiary.

Trial was had and notice of appeal was given prior to January 1, 1966.

Witnesses for the State, children whose ages were between eight and fourteen years at the time of the offense, testified that they were playing near a glass-walled telephone booth located near their homes. Several of the witnesses testified that the appellant was in the booth with his pants unzipped and was holding his privates in one hand while holding the telephone receiver with his other hand. They testified that appellant grinned and winked at them from within the telephone booth, then stepped outside and stated, "I will give you a dollar if you will go in the car and take a ride with me." Several of the children then began to run from the appellant, and he got in his car and drove away. As appellant was driving away, one of the children, a 14-year-old boy, wrote his auto license number on the sidewalk, and after conferring with his father, called the police and gave information which led to appellant's arrest.

In Cause No. 38,998, October 12, 1966, we affirmed the conviction of this same appellant for a similar offense that occurred only one day subsequent to the offense charged in the case at bar. During this trial evidence was admitted, over appellant's objection, of the offense involved in No. 38,998. Cause No. 38,998 involved indecent exposure by the appellant to two junior high school girls, aged 13 to 14 years, as they were walking home from school. Appellant contends that evidence of the extraneous offense should not be admitted.

The general rule is that the accused can be convicted only by evidence that he is guilty of the offense charged. See 23 Tex Jur 2d 294. However, exceptions and variations to this rule allow evidence of extraneous offenses. In the case at bar appellant testified that he might have been in the telephone booth on the alleged date, but denied that he had exhibited his privates to the children. In Gephart v. State, 249 S. W. 2d 612, this Court stated that proof of prior and subsequent acts are admissible if they explain and lend credence to the testimony concerning the conduct of the parties on the occasion charged in the indictment, which would not otherwise appear plausible where there was a denial of the act through testimony offered by appellant as to an alibi. In Calanchi v. State, 332 S. W. 2d 722, a case involving prosecution of a father for rape of his 13 year old daughter, we stated that "The acts of intercourse which appellant had with the sister were had in prostecutrix' presence, and were explanatory of his entire conduct toward her and were admissible for the same reason his prior acts of intercourse with the prosecutrix were admissible." Under these authorities no error is reflected by the admission of the extraneous offense.

Appellant further contends that reversible error is reflected by the prosecutor's asking of a question of appellant as to whether or not he had been convicted of assault with intent to commit robbery. Immediately after the question was asked, the jury was retired, and it was developed that appellant had in fact been so convicted, but that he had received a suspended sentence, which sentence had been later set aside. The careful trial judge both orally and in his charge instructed the jury not to consider the question propounded. We conclude that no reversible error was reflected by the asking of the question.

The record reflects that the assistant district attorney was aware of the fact that the prior conviction had resulted in a five year suspended sentence, but had no knowledge and had made no inquiry as to whether the judgment had been set aside and the case dismissed.

To render inadmissible the State's inquiry of a defendant as to a prior conviction which resulted in a suspended sentence, the defendant must affirmatively prove that he made application to have the judgment set aside and the case dismissed and that such motion was granted. Herrin v. State, 262 S. W. 486.

In Maddox v. State, 115 S. W. 2d 644, the fact of the dismissal had been made known to the court before the defendant was required to testify to the fact of his former conviction.

Finding the evidence sufficient to support the conviction and no reversible error appearing, the judgment is affirmed.

Morrison, Presiding Judge.

(Delivered October 19, 1966).

APPENDIX "B"

COURT OF CRIMINAL APPEALS OF TEXAS

No. 38,998

JAMES W. SMITH,

Appellant

v.

THE STATE OF TEXAS,

Appellee

OPINION

The offense is indecent exposure to a person under the age of 16 years; the punishment, two years in jail.

Two junior high school girls, aged 13 and 14 years on the day charged in the indictment, testified that as they were walking home from school appellant brought his white Chevrolet Impala to a halt near the curb where they were walking, and, after asking them for directions, offered them each two dollars to watch him masturbate. At this time appellant had his pants open, his privates exposed and he had his hand on his sexual organ moving it up and down as he spoke to them. The girls fled the scene, reported the matter to their parents and later identified appellant's picture from a group of pictures exhibited to them by police officers.

Appellant did not testify or offer any evidence in his own behalf.

The first question which merits discussion is appellant's motion to produce for pre-trial inspection any document in the possession of the District Attorney or the Police Chief which might be relevant on the issue of guilt or innocence or punishment. This case was tried before the effective date of Article 39.14, V.A.C.C.P., but even had it

been tried since the Act has been in effect, such a request would have been far too broad, because the article by its terms excepts written statements of witnesses, the work product of counsel and their investigators and their notes or reports.

We further find no merit in appellant's claim that his case should have been continued until he could secure appellate review of a civil mandamus judgment decided adversely to him, by which he sought to secure the documents in the hands of the above named officials by authority of a city ordinance which made public records available to all.

We find no error in the argument, as the same was clearly a plea for law enforcement. Henderson v. State, 295 S. W. 2d 215.

Finding the evidence sufficient to sustain the conviction and no reversible error appearing, the judgment is affirmed.

Morrison, Presiding Judge

(Delivered October 12, 1966)